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# THE INTERACTION OF ERISA AND THE AMERICANS WITH DISABILITIES ACT\*

EVAN J. SPELFOGEL\*\*

## INTRODUCTION

Health care may be the single largest issue facing the United States today. The number of uninsured or inadequately insured Americans now total over eighty million,<sup>1</sup> including retired persons, the unemployed, the homeless, and employees whose employers do not provide health care or insurance coverage.<sup>2</sup> For big business, the situation has become increasingly urgent.<sup>3</sup> Corporate America is struggling under the weight of burgeoning medical costs which now constitute nearly thirteen percent of our country's gross national product.<sup>4</sup> Over the past several years, Congress has considered more than thirty health care reform pro-

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<sup>1</sup> See James Sterngold, *Japan's Health Care: Cradle, Graves and No Frills*, N.Y. TIMES, Dec. 28, 1992, at A1; Joy Korngut & Patricia Willen, *Treasury Debunks Health Care Myths*, States News Service, July 21, 1994, available in LEXIS, News Library, Wires File.

<sup>2</sup> See generally Arnold Abrams, *Health Care Popular*, NEWSDAY, Aug. 16, 1994, at A20 (discussing success of health care facility for poor and homeless); *Free Health Care Clinics*, STAR TRIB., Aug. 15, 1994, at 7B (discussing clinics which provide health care services for "uninsured employees and children, unemployed people whose benefits have expired and people not yet receiving public assistance, as well as families whose medical insurance doesn't cover ordinary needs").

<sup>3</sup> See, e.g., Sterngold, *supra* note 1, at A1 (indicating that American businesses pay about five times more than Japanese companies for employee health insurance). Sterngold notes that American companies pay approximately \$3452 per employee per year. *Id.*

<sup>4</sup> Sterngold, *supra* note 1, at A1.

posals in an effort to remedy this<sup>5</sup> and related problems such as duplicative health benefit coverage, wasteful administrative costs, abuses of existing systems, and fraud.<sup>6</sup> President Clinton has submitted to Congress his proposal for reform, comprising over 250 pages of legislative text.<sup>7</sup> The forthcoming debate is certain to be prolonged, far-reaching and divisive.

Parallel to the move for health care reform has been the spreading epidemic of the Human Immuno Virus and Acquired Immune Deficiency Syndrome ("AIDS") and the devastating toll they have taken upon both the lives and livelihoods of infected persons and their families.<sup>8</sup> AIDS kills, on average, approximately ninety-two Americans every day and is now the third leading cause of death among people between twenty-five and forty-four years old.<sup>9</sup> The cost of treatment for and maintenance of persons afflicted with AIDS has far exceeded costs normally covered and absorbed by employers and their health insurance carriers.<sup>10</sup> In many cases, carriers have refused to continue insurance, reduced lifetime benefits, or dramatically increased premiums to reflect cost increases and the unpredictable variables involved in medical practice and technology.<sup>11</sup>

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<sup>5</sup> See John Schwartz & Mary Hager, *Start the Revolution With Me*, NEWSWEEK, Dec. 14, 1992, at 58 (noting Congress "tossed in more than 30 [health care] proposals").

<sup>6</sup> See Robert Pear, *Health-Care Plan May Cover Injuries on Job and Roads*, N.Y. TIMES, May 8, 1993, at 1 (noting goal of one particular proposal was to "reduce duplicative insurance policies, reduce administrative paperwork and save money in the health-care system overall") (quoting Robert O. Boorstin, spokesperson for Task Force on National Health Care Reform).

<sup>7</sup> See *Clinton Plan Does Not Address Fully Rural Health Issues*, PENS. & BEN. DAILY (BNA) (Sept. 15, 1993).

<sup>8</sup> See, e.g., Karen Shideler, *AIDS Dips Into the Hearts of Families*, Hous. CHRON., Dec. 1, 1993, at 3; Michele Lynche, *Nowhere to Hide from AIDS*, ST. PETERSBURG TIMES, Feb. 4, 1993, at 3.

<sup>9</sup> *AIDS-Prevention Initiative Aimed at Young Adults Unveiled by Shalala*, Health Care Policy Rep. (BNA) No. 2, at D10 (Jan. 10, 1994).

<sup>10</sup> Fred J. Hellinger, *The Lifetime Cost of Treating a Person With HIV*, 270 JAMA 474 (1993) (noting that "[e]stimates of the lifetime cost . . . of treating [individuals with AIDS] have climbed steadily over the past several years and now exceed \$100,000.").

<sup>11</sup> See, e.g., *infra* notes 13, 19, 21, 23, 35, and 38 (illustrating cases in which insurance carriers have reduced or attempted to reduce coverage to selected subscribers); see also *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) (discussing "unstable variables" which affect insurance and health care industries).

## I. ERISA—THE MCGANN DECISION

The conflict between employees diagnosed with AIDS and their employers and insurance carriers came to a head three years ago in the Fifth Circuit's decision in *McGann v. H & H Music Co.*<sup>12</sup> John McGann, an employee of H & H Music, discovered that he was afflicted with AIDS in December 1987. Soon thereafter, he submitted his first claims for reimbursement under the company's group medical plan.<sup>13</sup> At that time, the plan provided for lifetime medical benefits of up to one million dollars.<sup>14</sup> Upon learning of McGann's illness and the attendant long-term costs of caring for McGann, H & H Music, through its insurer, amended the plan to, inter alia, limit benefits payable for AIDS-related claims to a lifetime maximum of \$5000.<sup>15</sup> The amendment did not place this limitation on any other catastrophic illness.<sup>16</sup>

Upon exhausting the \$5000 benefits limitation, McGann filed suit under section 510 of the Employee Retirement Income Security Act ("ERISA"),<sup>17</sup> claiming that his employer, the plan administrator, and the plan insurer had all discriminated against him by reducing benefits for treatment of AIDS and AIDS-related illnesses.<sup>18</sup> The United States District Court for the Southern District of Texas granted the defendants' motion for summary judgment on the grounds that, in accord with ERISA, "the action was not taken to interfere with the rights of McCann [sic] but to ensure the future existence of the plan."<sup>19</sup> The Fifth Circuit affirmed, holding that section 510 of ERISA does not prohibit

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<sup>12</sup> 946 F.2d 401 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992).

<sup>13</sup> *Id.* at 403.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* Other changes included increased individual and family deductibles, elimination of coverage for chemical dependency treatment, adoption of a preferred provider plan, and increased contribution requirements. *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 832 (1974) (codified as amended at 29 U.S.C. § 1001-1461 (1988)). Section 510 makes it illegal for any person:

to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

*Id.*

<sup>18</sup> 946 F.2d at 403.

<sup>19</sup> 742 F. Supp. 392, 394 (S.D. Tex. 1990), *aff'd*, 446 F.2d 401 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992).

welfare plan discrimination between or among categories of diseases.<sup>20</sup>

On February 25, 1993, the Eleventh Circuit handed down a similar decision in *Owens v. Storehouse, Inc.*<sup>21</sup> In *Owens*, the employer, Storehouse Inc., had modified its employee welfare benefit plan to provide a lifetime benefits cap of \$25,000 for AIDS-related claims.<sup>22</sup> The United States District Court for the Northern District of Georgia rejected the allegations of an employee, Owens, that Storehouse had thereby violated section 510 of ERISA.<sup>23</sup> The court subsequently granted Storehouse's motion for summary judgment.<sup>24</sup> The Eleventh Circuit affirmed, holding that "ERISA does not prohibit a company from terminating previously offered benefits that are neither vested nor accrued."<sup>25</sup>

Storehouse instituted its employee welfare benefit plan in 1988, providing for a lifetime maximum benefit of one million dollars per employee.<sup>26</sup> In November 1988, Owens was diagnosed with AIDS and filed an initial claim.<sup>27</sup> Storehouse's insurer notified Storehouse of its intent to cancel the policy because of "the

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<sup>20</sup> 946 F.2d at 408 ("Section 510 does not mandate that if some, or most, or virtually all catastrophic illnesses are covered, AIDS (or any other particular catastrophic illness) must be among them.").

<sup>21</sup> 984 F.2d 394 (11th Cir. 1993).

<sup>22</sup> *Id.* at 396. The terms of Storehouse's original insurance policy provided group hospital and medical benefits up to a lifetime maximum of one million dollars per employee. *Id.* A dispute arose between Storehouse and its insurer when the insurer refused to continue to insure Storehouse's employees at this rate due to the high incidence of AIDS cases among Storehouse's employees. *Id.* Thereafter, a new insurance carrier was sought and an agreement was arranged. *Id.*

<sup>23</sup> 773 F. Supp. 416, 418 (N.D. Ga. 1991), *aff'd*, 984 F.2d 394 (11th Cir. 1993) (holding that "§ 510 was designed to protect the employment relationship, not the integrity of specific plans").

<sup>24</sup> *Id.* at 420.

<sup>25</sup> 984 F.2d at 397 (citing *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987)). The court further stated, "Congress did not require employee welfare benefit plans to be chiseled in stone. It intended flexibility in the apportionment of their terms." *Id.* at 400 (citing *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988)). The court continued by noting that § 510 "does not prohibit an employer from crafting its medical plan to meet economic imperatives" and does not "mandate fixed coverage of catastrophic diseases." *Id.* (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983); *McGann v. H & H Music Co.*, 946 F.2d 401, 408 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992); *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283 (3d Cir. 1988); *Viggiano v. Shenango China Div. of Anchor Hocking Corp.*, 750 F.2d 276, 279 (3d Cir. 1984); *Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees*, 740 F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985)).

<sup>26</sup> 984 F.2d at 396.

<sup>27</sup> *Id.* at 396-97.

high incidence of AIDS in the retail industry generally and among Storehouse's plan members in particular."<sup>28</sup> At that time, five Storehouse employees had been diagnosed with AIDS.<sup>29</sup> Subsequently, a series of negotiations were held between Storehouse and its insurer which led to a new, more costly policy with less coverage and guaranteed for only six months.<sup>30</sup> Under this policy, Storehouse was self-insured for the first \$75,000 in AIDS-related claims, compared to \$25,000 with respect to all other claims.<sup>31</sup> Faced with the possibility that at the end of six months it would be self-insured for all claims up to one million dollars per employee, Storehouse negotiated with and obtained insurance from another carrier.<sup>32</sup> In order to obtain such coverage, Storehouse modified its benefit plan to include a \$25,000 cap for coverage of AIDS and AIDS-related illnesses.<sup>33</sup> Notably, the original welfare benefit plan and each of the amended plans reserved to Storehouse the "full, absolute and discretionary right . . . to amend, modify, suspend, withdraw, discontinue or terminate the Plan in whole or in part at any time for any and all participants of the Plan."<sup>34</sup>

In analyzing the claims presented in *McGann* and *Owens*, the Fifth and Eleventh Circuits both undertook a review of the statutory language and legislative history of ERISA. Both courts cited to *Moore v. Metropolitan Life Ins. Co.*,<sup>35</sup> wherein the Second Circuit stated that "[w]ith regard to an employer's right to change medical plans, Congress evidenced its recognition of the need for flexibility in rejecting the automatic vesting of welfare plans."<sup>36</sup> The *Moore* court further provided that "medical insurance must take account of inflation, changes in medical practice and technology, and increases in the costs of treatment independent of infla-

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<sup>28</sup> *Id.* at 396.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> 984 F.2d at 396.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 396-97. Storehouse also imposed caps of \$25,000 for mental illness and substance abuse, \$2500 for joint dysfunction, \$500 for nicotine dependence and \$10,000 for growth hormone drugs for dependent children. *Id.* at 397.

<sup>34</sup> *Id.* at 397.

<sup>35</sup> 856 F.2d 488 (2d Cir. 1988).

<sup>36</sup> *Id.* at 492.

tion."<sup>37</sup> Further, the Supreme Court has held that ERISA does not proscribe discrimination in the provision of employee benefits.<sup>38</sup> As succinctly stated by the Fifth Circuit in *McGann*, to interpret ERISA section 510 "discrimination" so broadly as to preclude employers from placing a lifetime cap on a particular type of coverage "would clearly conflict with Congress's intent that employers remain free to create, modify and terminate the terms and conditions of employee benefit plans without governmental interference."<sup>39</sup> The *McGann* court also noted that an employer's right to change medical plans could lead to "decreas[ing] protection for future employees and retirees"<sup>40</sup> and could ultimately force employers to cease offering welfare benefits coverage altogether.<sup>41</sup>

## II. THE AMERICANS WITH DISABILITIES ACT

Neither the *McGann* court nor the *Owens* court were presented with or discussed the implications of the Americans with Disabilities Act ("ADA"),<sup>42</sup> even though the Act was being debated at the time and became effective in July 1992.<sup>43</sup> Emerging use of the ADA, however, has signaled a shift in the legal tactics of AIDS-inflicted employee plaintiffs in their battle to secure health benefits from their employers.<sup>44</sup> Equal rights lawyers and gay rights activists contend that AIDS is clearly covered under the ADA definition of a "disability" which is described as "a physical or mental impairment that substantially limits one or more of the

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<sup>37</sup> *Id.* In commenting on the statutory mandate of ERISA, the *Owens* court also cited *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985) (stating that ERISA "does not regulate the substantive content of welfare-benefit plans").

<sup>38</sup> See, e.g., *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 91 (1985) ("ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits.").

<sup>39</sup> 946 F.2d 401, 407 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992).

<sup>40</sup> *Id.* (quoting *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988)). The *McGann* court further indicated its support for allowing an employer to change medical plans by noting that "unstable variables" such as "inflation, changes in medical practice and technology, and increases in the cost of treatment independent of inflation . . . prevent accurate predictions of future needs and costs." *Id.* (quoting *Moore*, 856 F.2d at 492).

<sup>41</sup> *Id.*

<sup>42</sup> Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (Supp. 1993).

<sup>43</sup> *Id.*

<sup>44</sup> See Barbara Presley Noble, *Clashing Over AIDS Coverage*, N.Y. TIMES, Oct. 10, 1993, at F23 (discussing success of EEOC's Los Angeles office in quickly settling case in which they claimed ADA's protection extended to cases of two men suffering from AIDS whose coverage under insurance carrier dropped from \$300,000 to \$5000).

major life activities of such individual.”<sup>45</sup> Of the over 14,000 AIDS-related ADA disability complaints that have been filed at the Equal Employment Opportunity Commission (“EEOC”), several dozen are benefits-related.<sup>46</sup>

The ADA does not deal, on its face, with particular benefit plan limitations based on specific disabilities, and the EEOC has not formally dealt with the issue. The agency has, however, issued an informal “EEOC Interim Guidance on Application of ADA to Health Insurance” (“EEOC Guidance”),<sup>47</sup> pursuant to which a number of test cases have been initiated.<sup>48</sup>

The EEOC Guidance states that “not all health-related plan distinctions discriminate on the basis of disability.”<sup>49</sup> It further explains that providing “a lower level of benefits . . . for the treatment of mental/nervous conditions than is provided for the treatment of physical conditions” or providing for less or no benefits for eye care than for other physical conditions are “broad distinctions” which apply to the treatment of a “multitude of dissimilar conditions” and are not distinctions based on disability.<sup>50</sup> The EEOC further provides that although such distinctions may have a greater impact on certain individuals with disabilities, they do not intentionally discriminate on the basis of disability and do not violate the ADA.<sup>51</sup> However, the EEOC Guidance also states:

In contrast, however, health-related insurance distinctions that are based on disability may violate the ADA. A term or provision is “disability-based” if it singles out a particular disability (e.g., deafness, AIDS, schizophrenia), a discrete group of disabilities (e.g., cancers, muscular dystrophies, kidney diseases), or dis-

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<sup>45</sup> 42 U.S.C. § 12102(2).

<sup>46</sup> See Noble, *supra* note 44, at F23.

<sup>47</sup> EEOC Interim Guidance on Application of ADA to Health Insurance, 3 EEOC Compl. Man. (BNA) No. 176, at N:2301 (June 8, 1993) [hereinafter EEOC Guidance].

<sup>48</sup> See David A. Copus, *Americans With Disabilities Act*, NAT’L L.J., Oct. 11, 1993, at S12.

<sup>49</sup> EEOC Guidance, *supra* note 47, at N:2303. The EEOC Guidance indicates that “[i]nsurance distinctions that are not based on disability, and that are applied equally to all insured employees, do not discriminate on the basis of disability . . .” *Id.* More specifically, “broad distinctions, which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability.” *Id.*

<sup>50</sup> EEOC Guidance, *supra* note 47.

<sup>51</sup> EEOC Guidance, *supra* note 47.



ability in general (e.g., non-coverage of all conditions that substantially limit a major life activity).<sup>52</sup>

The EEOC appears willing to permit employers to limit health insurance benefits for treatment of some, but not all, classifications of disorders. The remaining classifications are considered disability-based distinctions and, therefore, improper unless within the protective ambit of section 501(c). It is submitted that such distinctions seem artificial and arbitrary, and that upon close analysis the EEOC Guidance does not provide the guidance promised.

Section 501(c) of the ADA specifically states that the Act should not be construed to prohibit or restrict a health care provider or administrator from underwriting, classifying, or administering risks, or from establishing or observing terms of a "bona fide" benefit plan that is not subject to state insurance regulation.<sup>53</sup> This section also states, however, that the employer may not use this right as a "subterfuge" to evade the purposes of the Act.<sup>54</sup>

The question, then, is how to reconcile the language of section 501 and the general purpose of the ADA with ERISA, which unquestionably occupies the field, to prohibit discrimination in employment on the basis of disability.

The terms "bona fide" and "subterfuge" have been fleshed out, defined, and explained in other federal employment discrimination statutes<sup>55</sup> and in Supreme Court decisions such as *United Air Lines, Inc. v. McMann*<sup>56</sup> in 1977 and *Public Employees Retirement System v. Betts*<sup>57</sup> in 1989. The Supreme Court held in *McMann* that a benefit plan is "bona fide" if it "exists and pays benefits."<sup>58</sup> The *Betts* Court held that "subterfuge" occurs only when the employer has an actual intent to circumvent the ADA in an aspect of

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<sup>52</sup> *Id.* at N:2304. Conversely, some commentators argue that persons with the HIV virus or AIDS may not be disabled within the meaning of the ADA. Such a position would severely undercut the EEOC's "informal" position that all persons who are HIV positive or have AIDS constitute a discrete group.

<sup>53</sup> Americans with Disabilities Act of 1990 § 501(c), 42 U.S.C. § 12201(c) (1993).

<sup>54</sup> *Id.*

<sup>55</sup> See, e.g., Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1993).

<sup>56</sup> 434 U.S. 192 (1977).

<sup>57</sup> 492 U.S. 158 (1989).

<sup>58</sup> 434 U.S. at 194. Justice White, in his concurring opinion, stated that United's plan was found to be "bona fide" because it provided "substantial benefits." *Id.* at 206-07.

employment unrelated to fringe benefits.<sup>59</sup> The clear congressional intent in ERISA and the Supreme Court's construction of the terms in related employment cases, which was not rejected by Congress in enacting the ADA, should control.

### III. THE LEGISLATIVE HISTORY OF THE ADA

Much of the legislative history of the ADA indicates that the statute was not intended to affect the regulation of the insurance industry. During the debates over the ADA, the United States Senate Committee on Labor and Human Resources stated that "section 501(c) . . . should not be interpreted as subjecting self-insured plans to any State insurance laws of general application regarding underwriting risks, classifying risks, or administering such risks that are otherwise preempted by the Employee Retirement Income Security Act of 1974 (ERISA)."<sup>60</sup> Similarly, the House Judiciary Committee stated that section 501(c) was not intended to affect the legitimate classification of risks in insurance plans, and that benefits should continue to be underwritten for health insurance to limit or exclude coverage "so long as the standards used are based on sound actuarial data and not on speculation."<sup>61</sup> The Committee further stated that "[s]ection 501(c)(2) recognizes the need for employers, and their [insurers], to establish and observe the terms of employee benefit plans, so long as these plans are based on legitimate underwriting or classification of risks."<sup>62</sup>

The House Committee on Education and Labor, referring to section 501, stated that the primary purposes of the ADA "include prohibiting discrimination in employment, public services, and places of public accommodation," but that the committee "does not intend that any provisions of this legislation should affect the way the insurance industry does business in accordance with the State laws and regulations under which it is regulated."<sup>63</sup> The committee report further stated that "a person with a disability cannot be

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<sup>59</sup> 492 U.S. at 177. The court, in construing the statutory language, adopted the ordinary meaning of "subterfuge" and defined it as a "scheme, plan, stratagem, or artifice of evasion." *Id.* at 167.

<sup>60</sup> S. REP. NO. 116, 101st Cong., 1st Sess. 86 (1989).

<sup>61</sup> H.R. REP. NO. 485 (III), 101st Cong., 2d Sess. 70 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 493.

<sup>62</sup> *Id.*

<sup>63</sup> H.R. REP. NO. 485 (II), 101st Cong., 2d Sess. 136 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 419.

denied insurance or be subject to different terms or conditions of insurance based on disability alone," but that costs and increased insurance risks must be taken into account.<sup>64</sup> Additionally, the committee report indicated that section 501(c) was added to make it clear that the new legislation would not "disrupt the current nature of insurance underwriting or the current regulatory structure for self-insured employers or of the insurance industry in sales, underwriting, pricing, administrative and other services, claims, and similar insurance related activities based on classification of risks . . . ."<sup>65</sup>

The Senate Committee on Labor and Human Resources Report also stated that, under the ADA, "it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments," and that "[a] limitation may be placed on reimbursements for a procedure or the types of drugs or procedures covered . . . [provided that] [a]ll people with disabilities have equal access to the health insurance coverage that is provided by the employer to all employees."<sup>66</sup> Moreover, the report continued: "Employers may continue to offer policies that contain pre-existing condition exclusions, even though such exclusions adversely affect people with disabilities, so long as such clauses are not used as a subterfuge to evade the purposes of this legislation."<sup>67</sup>

#### IV. THE EEOC POSITION

The EEOC appears to disagree with both the legislative history and the express language of the statute. It has completely rejected the Supreme Court's interpretation of the terms "bona fide" and "subterfuge" and, instead, proposes in its EEOC Guidance a nonexclusive list of potential business or insurance justifications that a respondent must prove when any disability-based limitation it imposes is challenged.<sup>68</sup>

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<sup>64</sup> *Id.* The Committee Report states that the ADA prohibits an insurer from denying insurance or raising the rates of a disabled person without their decision being based on a risk calculation. *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> S. REP. NO. 116, 101st Cong., 1st Sess. 86 (1989).

<sup>67</sup> *Id.* at 29.

<sup>68</sup> EEOC Guidance, *supra* note 47, at N:2306-07.

The EEOC's position has led to increased benefits-related litigation throughout the country.<sup>69</sup> In April 1993, the Los Angeles regional office of the EEOC filed suit against the Allied Services Division Welfare Fund for reducing AIDS-related coverage from \$300,000 to \$5000.<sup>70</sup> The case was settled in late September with the Fund agreeing to pay damages of \$10,500 to two men, presumably to avoid the potential cost of litigation.<sup>71</sup>

Then, in June 1993, the EEOC filed suit in New York federal court against the Mason Tenders District Council Welfare Fund,<sup>72</sup> claiming that a cap on benefits for treatment of HIV, AIDS Related Complex ("ARC"), and AIDS-related illnesses violated the ADA.<sup>73</sup> The Fund had eliminated medical coverage for these illnesses over a year before the effective date of the ADA.<sup>74</sup> The Fund moved to dismiss, arguing, *inter alia*, that only ERISA, and not the ADA, governs medical plan modifications since ERISA "fully occupies" the field of employee benefit plans.<sup>75</sup> They further

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<sup>69</sup> See Copus, *supra* note 48, at S12. Copus notes that since the passage of the Americans with Disabilities Act, more individuals have turned to lawsuits to challenge "disability-specific benefit plan limitations." *Id.*; see also Noble, *supra* note 44, at F23. For example, on September 14, 1993, "John Doe" filed a complaint in the United States District Court for the Eastern District of Virginia, challenging his employer's benefit cap on treatment of AIDS related conditions. *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Noble, *supra* note 44, at F23. The author also notes that many benefits-related complaints have been filed by the EEOC under the guise of a violation of the ADA. *Id.*

<sup>72</sup> EEOC v. Mason Tenders Dist. Council Welfare Fund, No. 93-3865 (S.D.N.Y. filed June 9, 1993).

<sup>73</sup> Copus, *supra* note 48, at S12; see *N.Y. Benefit Fund Asks Court to Invalidate EEOC Ruling on AIDS Discrimination Under ADA*, 40 Daily Lab. Rep. (BNA), at A-8 (Mar. 3, 1993) [hereinafter *N.Y. Benefit Fund*].

<sup>74</sup> See *N.Y. Benefit Fund*, *supra* note 73, at A8. ("The Mason Tender's strongest argument is the jurisdictional argument-that the fund predates the effective date of the ADA and that when it cut back benefits . . . it was . . . making a 'good business judgment.'").

<sup>75</sup> EEOC v. Mason Tenders Dist. Council Welfare Fund, No. 93-3865 (S.D.N.Y. filed June 9, 1993). ERISA's regulatory scope is grounded in a broad preemption clause. Section 514(a) of ERISA preempts "any and all state laws insofar as they now or hereafter relate to any benefit plan." 29 U.S.C. § 1144(a) (1993). "A law 'relates to' an employee benefit plan . . . if it has a connection with or reference to such plan." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-97 (1983).

In *Mason Tenders*, the Fund also argued that it was not an "employer" or "agent" of an "employer" under ERISA and thus not subject to liability under the ADA. EEOC v. Mason Tenders Dist. Council Welfare Fund, No. 93-3865 (S.D.N.Y. filed June 9, 1993). Such an argument, that a fund is not a covered entity under the ADA, was accepted by a New Hampshire federal judge in *Carparts Distribution Ctr. Inc. v. Automotive Wholesaler's Ass'n of New England Inc. Ins. Plan*, 826 F. Supp. 583, 585 (D.N.H. 1993) *vacated*, No. 93-1954, 1994 WL 543530 (1st Cir. Oct. 12, 1994). Judge Sprizzo, however, rejected this argument in his decision.

asserted that Congress enacted ERISA to create incentives for the establishment and continuance of health and other employee benefit plans, and that the ADA is not, and should not be, construed as a "mandated benefit statute."<sup>76</sup> The Fund acknowledged that even if the EEOC view is accepted, employers and insurers may still impose disability-based distinctions under the ADA provided they can satisfy their burden of proof by producing an adequate business or cost justification for the plan limitation.

On November 19, 1993, Judge John E. Sprizzo denied the Fund's motion to dismiss, reserving for trial proof of the Fund's business necessity, or as the court stated, an actuarial basis for the exclusion.<sup>77</sup> Judge Sprizzo's decision appears to have adopted the position enunciated in the EEOC Guidance.<sup>78</sup>

Finally, on September 9, 1993, the Philadelphia district office of the EEOC charged the Laborers District Council Building and Construction Health and Welfare Fund (which insures Philadelphia construction workers) with violations of the ADA in capping lifetime medical benefits for AIDS-related illnesses at \$10,000.<sup>79</sup> Plan participants were otherwise eligible for lifetime benefits of up to \$100,000 for any disease or condition unrelated to HIV infection. The Fund contended that the cap was necessary because of its "precarious financial state, caused by a decline in hours worked by union members and rising health care costs."<sup>80</sup> The Fund also argued that the lifestyle of its members, who have a greater than average drug history, places them at greater risk for HIV infection.<sup>81</sup> The EEOC, finding that the Fund had no real data to sub-

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<sup>76</sup> EEOC v. Mason Tenders Dist. Council Welfare Fund, No. 93-3865 (S.D.N.Y. filed June 9, 1993).

<sup>77</sup> See *Mason Tenders v. Donaghey*, 93 Civ. 1154 (S.D.N.Y. 1993); *Federal Court Denies Summary Judgment to Fund That Cut Off Coverage of Aids*, 223 Daily Lab. Rep. (BNA), at AA-1 (Nov. 22, 1993).

<sup>78</sup> See Karen Donovan, *Health Fund Held Subject to ADA In AIDS Exemption*, NAT'L L.J., Dec. 6, 1993 at 17, 22. Specifically, the author describes the EEOC's definition of "subterfuge" as being "disability based disparate treatment that is not justified by the risks or costs associated with the disability." *Id.* at 22.

<sup>79</sup> See Laborers Dist. Council Bldg. & Constr. Health & Welfare Fund, EEOC Charge No. 170930899 (Sept. 9, 1993); see also *EEOC Finds Union Health Fund Violated ADA by Capping HIV-Related Benefits at \$10,000*, 186 Daily Lab. Rep. (BNA), at D9 (Sept. 28, 1993) [hereinafter *EEOC Violation*]. The EEOC determined that the cap was a "subterfuge" because it occurred just two months after the insured was diagnosed with AIDS. *Id.*

<sup>80</sup> See *EEOC Violation*, *supra* note 79, at D9; see also *N.Y. Benefit Fund*, *supra* note 73, at A8.

<sup>81</sup> See *EEOC Violation*, *supra* note 79, at D9.

stantiate these claims, announced that it would be prepared to go to federal court to seek a preliminary injunction lifting the cap if settlement efforts fail.<sup>82</sup>

### CONCLUSION

Companies and insurance plans assert that eliminating or capping coverage for AIDS is not inherently discriminatory, but is essential for employers and plans that endeavor to be fiscally responsible. They note that the basic objective of insurance is to provide the greatest coverage for the least cost despite the fact that some diseases are more expensive than others. It appears to some that the EEOC is trying to impose social policy on fiduciary decisions governed exclusively by ERISA. By providing "guidance" in the absence of express statutory authority in the ADA or clear legislative history, the EEOC may be overstepping legitimate administrative boundaries.

While the courts seek to resolve the conflict between ERISA and the ADA, as exemplified by *McGann*, *Owens*, and the recently initiated EEOC litigation, President Clinton's proposed health care reform may moot some, if not all, of the dispute. The Clinton plan guarantees uniform coverage for virtually all medical conditions, including AIDS.<sup>83</sup> However, enactment of health care reform may be several years away, thereby leaving a window of opportunity for significant litigation. In addition, the Clinton proposal does not cover long-term disability plans. Thus, to the extent employer long-term disability plans exclude disabilities arising from AIDS-related illnesses, protracted litigation may continue.<sup>84</sup> Finally, an analysis of the Clinton plan reveals a proposed dollar cap on treatment for mental and nervous disorders and substance abuse.<sup>85</sup> Whether these proposed caps, if adopted, lend credence to employers' claims that disability-specific caps do not violate the ADA is a question for future debate.

Employee benefits now exceed thirty percent of an employer's labor costs. Health care costs account for the overwhelming majority of these costs, and, unless retarded by health care reform, are expected to double over the next two years and, thereafter, to

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<sup>82</sup> 186 Daily Lab. Rep. (BNA), at D9 (Sept. 28, 1993).

<sup>83</sup> For a discussion of the Clinton proposal, see generally Robert Pear, *Congress Is Given Clinton Proposal for Health Care*, N.Y. TIMES, Oct. 28, 1993, at A1.

<sup>84</sup> Copus, *supra* note 48, at S12.

<sup>85</sup> Copus, *supra* note 48, at S12.

continue to rise at an average rate ranging from ten to thirteen percent. Insurers across the country are filing for and lobbying for substantial increases in benefit plan premiums. If these increases are granted, it is estimated that the annual cost for a family of four, with basic coverage, would increase to almost \$10,000 per year in most major cities. As President Clinton observed, the United States is "choking on a health care system that is not working."<sup>86</sup>

AIDS-related conditions account for an increasingly significant portion of health care costs every year. In the coming years, other diseases may be discovered that give rise to costs equal to or exceeding those now being incurred in connection with HIV and AIDS-related conditions. Efforts by the EEOC to advance the cause of social justice and protect the financial well-being of the small but increasing number of employees may, in reality, lead to the unintended result of forcing employers and insurers to impose annual and lifetime dollar caps across-the-board for all plan participants, or to eliminate coverage altogether. In this regard, the EEOC seems to be at cross purposes with the White House and Congress.

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<sup>86</sup> Pear, *supra*, note 83, at A1.